UNITED MALAYAN BANKING CORP. BHD.

v.

PALM & VEGETABLE OILS (M) SDN. BHD. & ORS.

FEDERAL COURT, KUALA LUMPUR
RAJA AZLAN SHAH ACTING LP
SALLEH ABAS FJ
ABDUL HAMID OMAR FJ
[CIVIL APPEAL NO. 12 OF 1982]
13 OCTOBER 1982

BANKING: *Bank & Banking business - Bank granting loan and credit facilities - Guarantee and indemnity by others - Shares - Deposited as security - Disposed to settle account without knowledge of owners - Genuineness of sale - Amended defence and counterclaims - Triable issues - Whether any - Summary judgment - When available.*

In order to secure for the 1st respondent a fixed loan of RM5 million and credit facilities for the sum RM9 million, the 2nd, 3rd & 4th respondents executed Guarantee Agreements dated 1 June 1976 and letters of guarantee and indemnity dated 1 September 1976 to the appellant. Banking facilities were granted to the 1st respondent, and on failure to comply with the notices of demand, the appellant took a specially endorsed writ on 12 November 1979 for the outstanding sum of RM8,540,846.34 with accrued interest.

As security for credit facilities the respondents had lodged with the appellant worth RM11 million and further the appellant had lodged private caveats against certain lands belonging to the respondents. This was not disclosed in the statement of claim until a later date. In response to the defence and the counterclaim of the respondents, the appellant delivered his reply and defence on 12 January 1980. On 6 February 1980 the appellant took a summons to strike out the defence and counterclaim following which on 20 February 1980 the respondents applied for leave to file fresh defence and counterclaim followed by two more. Subsequent to an Order made on 5 June 1981, a defence on behalf of the respondents was filed on 10 June 1981.

The appellant took an order for summary judgment against all the respondents for the sum of RM3,490,113.26 only with 8% interest. The lesser claim was due to the fact that the appellant had realised a sum of RM5,657,763.79 by disposing the shares lodged as security for the loan, without reference to or knowledge of the respondents. The Senior Assistant Registrar who heard the application entered judgment for the appellant on 20 August 1982. On appeal the learned Judge on 9 January 1982 granted an unconditional leave to the respondents to defend and to file an amended defence and counterclaim within 30 days and this was done on 20 February 1982.

The appellant appealed against the order of the learned Judge, as to whether there were any triable issues which justify leave to the respondents to defend. On the other hand the respondents in their defence raised the issues on the:

(a) Genuineness of the sale of shares by the appellants,

(b) Determination of the 1st respondent's liability, and

(c) Whether in April 1979 there was an informal Schedule of arrangement including a temporary moratorium.

Several allegations were made by both parties but however the question that need to be considered was whether or not there were issues or questions in dispute which ought to be tried.

Held:

This court has not dealt in any detail with the facts and particulars of the several allegations made on both sides as it is not the court's province to touch on the merits of the issues involved. It only needs to be considered whether or not there are issues or questions in dipute which ought to be tried. Summary judgment is only given in a plain and obvious case. This is certainly not one. There are in fact triable issues and this is substantiated by the necessity for applications for the admission of Queen's Counsel in this appeal on the grounds of the complexity of the case which involves difficult questions of fact and law and also voluminous affidavits and exhibits tendered and arguments presented.

[Appeal dismissed with costs. Deposit to be paid to the respondents.]

Cases referred to:

Gold Ores Reduction Co. v. Pain [1892] 2 QB 14
Cuckmere Brick Co. Ltd. & Anor. v. Mutual Finance Ltd. [1971] Ch 949
Dobbs v. The National Bank of Australasia Ltd. [1935] 53 CLR 643

For the appellant - Robert Gatehouse, QC. (Dr. Stephen Goh with him)
For the respondents - Peter Millett, QC. (S. Narayanan with him)

JUDGMENT

Raja Azlan Shah Acting LP:

The brief facts of this matter are that in consideration of guarantee agreements dated 1 June 1976 for the sum of RM5 million in respect of a fixed loan to the 1st respondent for that amount and letters of guarantee and indemnity dated 1 September 1976 for credit facilities for the purchase of bills of exchange by the 1st respondent for the sum of RM9 million executed by the 2nd, 3rd and 4th respondents, the appellant granted to the 1st respondent banking facilities to that end, and on the respondent's failure to comply with notices of demand for the outstanding sums due the appellant took out a specially indorsed writ in these proceedings on 12 November 1979 claiming against the respondents the sum of RM8,540,846.34 being the aggregate of the amounts then due and outstanding and the accrued interest thereon.

The appellant however in its statement of claim did not state that the respondents had in fact as security for the credit facilities to be given to the 1st respondent lodged with the appellant shares (which according to the respondents had as at February 1981 a total market value exceeding RM11 million excluding bonus issue shares) under 4 memoranda of deposit of shares and powers of attorney in its favour. Nor was there any reference therein to some subsequent arrangement between the parties that culminated in a consolidation agreement dated 25 October 1978 and the lodging of private caveats by the appellant against certain lands belonging to the respondents. The respondents filed their defence together with a counterclaim by the 1st respondent on 20 December 1979 and 12 January 1980 the appellant delivered a reply and defence thereto. On 6 February 1980 the appellant took out a summons to strike out the defence and counterclaim but on 20 February 1980 the respondents applied also by summons for leave to file a fresh defence and for the 1st respondent to amend its counterclaim. The record also discloses an amended defence and counterclaim dated 31 March

1980 and another undated defence and counterclaim. There is however an order made on 5 June 1981 giving leave to the respondents to file a fresh defence within 7 days and, pursuant thereto no doubt, a defence was filed on behalf of the respondents on 10 June 1981. For good measure to close this episode on pleadings we should perhaps mention that when unconditional leave was granted on 9 January 1982 to the respondents to defend this action, they were also granted leave to file an amended defence and counterclaim within 30 days, and this was done on 20 February 1982.

The appellant took out on 16 June 1981 an O. 14 summons for summary judgment against all the respondents for the sum of RM3,490,113.26 together with interest at 8% per annum from judgment until realisation and of course for costs. The lesser amount asked for as against the sum of RM8,540.846.34 claimed in the statement of claim is explained by the fact that between January and September 1980, after the issue of the writ in this action and without reference to or the knowledge of the respondents, the appellant had disposed of the shares lodged with it as security for the loan, overdraft and purchase of bills of exchange although the fact of such deposit of shares had not been disclosed or adverted to by the appellant in its claim, and according to the supporting affidavit affirmed by the appellant's solicitor a sum of RM5,657,763.79 realised from such sale had been credited to the account of the 1st respondent; the amount for which summary judgment is sought is accordingly the amount due and owing as at the date of issue of the O. 14 summons.

The appellant's application for summary judgment was heard by the Senior Assistant Registrar who entered judgment for the appellant in terms thereof on 20 August 1981, but on appeal therefrom the learned Judge set aside the Registrar's order on 9 January 1982 and gave the respondents unconditional leave to defend.

The short point that arises for determination in this appeal before us from the order of the learned Judge is whether there are in the circumstances triable issues which justify leave to the respondents to defend this action. The respondents have raised a number of issues in their defence and Mr. Millett on their behalf refers primarily to 3 main issues, namely, (1) whether there has been any genuine sale of the shares deposited to third parties at arm's length with full credit given to the respondents of the proceeds; (2) whether the restructuring in 1978 included an agreement to determine the liability of the 1st respondent under the bills finance by transferring that to the 4th respondent; and (3) whether in April, 1979 there was an informal scheme of arrangement including a temporary moratorium.

As we have said earlier the deposit of the shares as security was not disclosed in the statement of claim when the action was instituted nor was the fact that the security had been realised in a series of sales of the shares between January and September 1980, and these matters were only disclosed for the first time in June 1981 in the affidavit in support of the O. 14 summons. This omission is surprising, to say the least, and we cannot but observe that any defect or omission in the statement of claim cannot be made good by affidavit evidence : *Gold Ores Reduction Co. v. Pain* [1892] 2 QB 14 where Mathew J said that -

> it is most important that a defendant should know from the writ what the exact claim against him is.

The respondents also complain of the timing of the sale and the price realised and we would on this aspect refer to *Cuckmere Brick Co. Ltd. & Anor. v. Mutual Finance Ltd.* [1971] Ch. 949 [which was applied in *Duke v. Robson* [1973] 1 AER, 481, 488 (at p. 488)] that the duty

of a mortgagee to a mortgagor when exercising his power of sale is to take reasonable care to obtain a proper price, a duty which has since been extended by the English Court of Appeal to guarantors as well in *Standard Chartered Bank v. Walker & Anor.* (*The Times*, 21 June 1982). We would add that even after the sale of the shares there was and has been no attempt to amend the statement of claim to reflect the position.

The respondents raised several defences in respect of the sale of the shares deposited and for reasons of brevity it will suffice to refer to paras. 3 to 6 of the amended defence and counterclaim dated 20 February 1982 which in effect reflect and repeat the averments in the affidavits affirmed by the 3rd respondent which include pleas of waiver on the part of the appellant by electing to sue on the debt without realising the security and estoppel in that they continued to their detriment to trade in the belief that the shares had not been sold. The first sale of shares took place on 24 January 1980 but the appellant applied on 6 February 1980 to strike out the defence and enter judgment on its claim in full as set out in the statement of claim without any credit being given for the proceeds of the sale were not credited in the statement of accounts as at 31 December 1980 although all the shares had been disposed of in September 1980. The appellant's manager affirms in an affidavit to the effect that the proceeds of the sales were credited into a suspense account for the benefit of the respondents and states that it is the standard practice of banks to do so and not credit such moneys into respondents' account until settlement by consent or by an order of Court. And yet in the face of this averment, in the application for summary judgment and before any order made the appellant purported in fact to credit the respondents with the proceeds of the sale of the shares to seek summary judgment for a lesser sum. Correspondence from the respondents' solicitors in the latter part of 1980 with regard to the fate of the shares deposited elicited no response and a letter of 18 February 1981 from the appellant's solicitors again gives no information whatsoever on the query posed and makes no more than a terse and elusory observation that the appellant has exercised and would continue to exercise its rights under the security documents until full discharge of the moneys owing.

The appellant seeks to rely on the conclusive evidence clause in the memoranda of deposit of shares in relation to a certificate by an officer of the appellant but that clause only results in precluding a challenge to the certificate in so far as the existence and the amount of the debt is concerned, and, in *Dobbs v. The National Bank of Australasia Ltd.* [1935] 53 CLR 643 the High Court of Australia said (at p. 651) that such a clause should not be interpreted as covering all grounds which go to the validity of a debt. The respondents have put in a counterclaim as well for damages for the loss allegedly sustained as a result of the sale of the shares deposited in the circumstances. The several points taken in relation to the non-disclosure of the security given and its midstream sale after the institution of proceedings and again without disclosure to the respondents would in our view require proper investigation and cross-examination and accordingly justify a trial in respect thereof.

On the issue taken with regard to the restructuring in 1978, the question raised is whether that part of the restructuring relating to the proposal by the appellant to grant a further term loan of some RM7 million odd to the 4th respondent for the purpose of repaying the 1st respondent's liability on the bills account was implemented. The contention of the respondents on this point would appear to be that it was and that as a result the appellant is still owed moneys on the term loan but not on the bill facilities but the amount due under the term loan is less than the proceeds from the sale of the shares deposited. This aspect again entails evidence being adduced and tested in cross-examination and merits trial.

On the matter of the informal scheme of arrangement in April 1979, particulars of which are set out in the amended defence and the affidavits of the 3rd respondent, the respondents contend that there was forbearance to sue on the part of the appellant and that the notice of demand was therefore premature and bad and there was accordingly no cause of action at the date of issue of the writ in these proceedings. The appellant denies this and says there was in any event no consideration for any such agreement, and in this regard the respondents allege they did give further security and say that they are only alleging that the action is premature. The appellant did however in fact lodge caveats on properties belonging to the respondents and the grounds for lodging the caveats do in fact indicate clearly that one of the considerations therefore was the appellant withholding legal action to recover outstanding moneys. The Assistant General Manager of the appellant also in an affidavit affirmed on 23 April 1979 refers to the appellant's forbearance to sue but states that the 3rd respondent did not ensure the completion of the second charge which was part of the arrangement. The 3rd respondent however in an affidavit affirmed on 12 February 1981 denies this allegation and explains that the first chargee had refused to give its consent thus precluding the registration of the second charge which had executed. All these allegations raise questions which necessitate a trial for the issue in dispute to be determined and resolved.

We have not dealt in any detail with the facts and particulars of the several allegations made on both sides as it is not our province to touch on the merits of the issues involved. We only need to consider whether or not there are issues or questions in dispute which ought to be tried. Summary judgment is only given in a plain and obvious case. This is certainly not one. We find as we have indicated that there are in fact triable issues and this is substantiated by the necessity for applications for the admission of Queen's Counsel in this appeal on the grounds of the complexity of the case which involves difficult questions of fact and law and also voluminous affidavits and exhibits put in and the arguments presented before us over a period of two days.

We accordingly dismiss this appeal with costs and order the deposit lodged in Court to be paid out to the respondents to account of their costs.

Also found at [1982] CLJ 547